In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 377

ANTHONY S. NOGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 272 F. Supp. 51. The opinion of the court of appeals (Pet. App. B, v–x) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1969. The petition for a writ of certiorari was filed on July 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

361-080

QUESTION PRESENTED

Whether a federal employee, who is eligible for and has received workmen's compensation benefits under the Federal Employees' Compensation Act for injuries suffered in an automobile collision caused by the negligence of a fellow employee, is barred by the exclusivity provision of that statute from recovering additional damages from the United States in an action under the Federal Tort Claims Act.

STATUTES INVOLVED

The pertinent provisions of the Federal Employees Compensation Act, 5 U.S.C. (Supp. IV) 8101 *et seq.*, and the Federal Drivers Act, 28 U.S.C. 2679(b)–2679(e), are set forth in Appendix A of the petition.

STATEMENT

On August 22, 1966, Peter Anthony Noga brought this suit for $1,000,000 damages in the United States District Court for the Northern District of California under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2671 *et seq.*), alleging that he was injured while riding as a passenger in an automobile driven by Dennis Bruce, a government employee acting within the scope of his employment.

The United States moved for summary judgment on the ground that Noga at the time of the accident was a government employee, and that he had filed a claim under the Federal Employees' Compensation Act (5 U.S.C. (Supp. IV) 8101 *et seq.* (then 5 U.S.C. 751 *et seq.*)) (hereafter "Compensation Act") which had been approved by the Bureau of Em-

ployees' Compensation. The government contended that, because the remedy under the Compensation Act is expressly exclusive (5 U.S.C. 8116(c)), his suit under the Federal Tort Claims Act could not be maintained. Noga, on the other hand, contended that, because the Federal Drivers Act (28 U.S.C. 2679(b)-2679(e)) took away his right of recovery as against Bruce, a remedy against the United States in substitution therefor should be made available to him.

The district court, ruling that the Compensation Act provided the claimant's exclusive remedy against the United States, granted the government's motion for summary judgment. The court of appeals affirmed the judgment on the same ground.[1]

ARGUMENT

The decision below correctly applies this Court's settled interpretation of the exclusivity provision of the Compensation Act and is not in conflict with the decision of any other court of appeals. Further review is, therefore, not warranted.

1. This Court and the courts of appeals have consistently held that federal employees covered by the Compensation Act are precluded from seeking damages against the United States or its instrumentalities under any general tort theory or other liability statute because the Compensation Act expressly provides that it is the injured federal employee's *exclusive* remedy against the United States. *E.g., Johansen* v.

[1] While the case was pending before the court of appeals, Noga died and Anthony S. Noga, Special Administrator of the Estate of Peter Anthony Noga, was substituted as plaintiff and petitioner.

United States, 343 U.S. 427; *Patterson* v. *United States,* 359 U.S. 495; *Balancio* v. *United States,* 267 F. 2d 135 (C.A. 2), certiorari denied, 361 U.S. 875; *Posegate* v. *United States,* 288 F. 2d 11 (C.A. 9), certiorari denied, 368 U.S. 832; *Cobia* v. *United States,* 384 F. 2d 711 (C.A. 10), certiorari denied, 390 U.S. 986; *Vantrease* v. *United States,* 400 F. 2d 583 (C.A. 6). Indeed, this Court recently recognized as an "historic truth" that the exclusive administrative workmen's compensation remedies are "substitutes for, not supplements to, common-law tort actions." *United States* v. *Demko,* 385 U.S. 149, 151.

2. Petitioner contends, however, that despite the settled exclusivity principle, he should be permitted to pursue his supplementary claim under the Tort Claims Act because the Federal Drivers Act assertedly took away a pre-existing remedy against the individual driver, Bruce. But, as the court below correctly held, there is "no room" in either Act for such a construction "contrary to the exclusivity provision" of the Compensation Act (Pet. App. B. viii).

The Federal Drivers Act was enacted in 1961 to protect government drivers from the threat and burden of suits and judgments resulting from driving for the government. See H. Rep. No. 297, 87th Cong., 1st Sess.; S. Rep. No. 736, 87th Cong., 1st Sess. The statute accomplishes that purpose by immunizing individual drivers from liability arising out of driving in the course of their government employment, and by limiting the plaintiff to his remedy against the United States under the Tort Claims Act.

It is true that where, as here, the plaintiff is himself a federal employee, he cannot, in view of the exclusivity provision of the Compensation Act, maintain an action against the United States under the Tort Claims Act. This is because Congress intended the Compensation Act to replace entirely any tort liability of the United States to covered employees; in return the employees receive as a fair substitute the administrative compensation remedy which "would afford employees and their dependents a planned and substantial protection." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23.[2] Of course, there is no constitutional bar to the replacement of a common law tort action by statutory workmen's compensation benefits. *N.Y. Central R.R.* v. *White,* 243 U.S. 188.

Petitioner's reliance upon *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731, and *Reed* v. *The Yaka,* 373 U.S. 410, for the proposition that the exclusivity provision of the Compensation Act shall not apply here, is misplaced. Aside from the fact that those cases involve considerations peculiar to the law of admiralty, they deal solely with the rights of maritime employees against private employers. With respect to the rights of maritime employees of the United States, this Court held in both *Johansen* v. *United States, supra,* and *Patterson* v. *United States, supra,* that

[2] This Court has noted the advantages to a claimant of the comprehensive system of benefit payments under the Compensation Act. *Johansen* v. *United States,* 343 U.S. at 440–441. These payments, under the Compensation Act, may exceed $1,750 per *month* to a disabled federal employee. 5 U.S.C. 8112.

the Compensation Act provides the sole remedy available against the United States. It was, accordingly, held in *Aho* v. *United States,* 374 F. 2d 885 (C.A. 5), certiorari denied, 389 U.S. 930, that *Reed* v. *The Yaka, supra,* does not apply to government seamen, and that such seamen could have no recovery against the United States other than the benefits provided by the Compensation Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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